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No. 07-285

FILED
NOV 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC. d/b/a PROGRESSIVE BUSINESS PUBLICATIONS,

Petitioner,

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA and BETTER BUSINESS BUREAU OF METROPOLITAN WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

Respondents do not dispute that there is a division among the Circuits and state courts of last resort on the important First Amendment question that Petitioner raises. Instead, the main thrust of Respondents' argument is their contention that the trial court made dispositive rulings in favor of Respondents on other grounds that were not disturbed on appeal.

Respondents' argument would be well-taken if the Pennsylvania appellate courts had decided those alternative grounds, in which event they would not be open for consideration on remand from this Court after a final decision of the Constitutional question. However, that is not the case here.

Petitioner challenged these alternative rulings in its appeals to both the intermediate appellate court and the Pennsylvania Supreme Court. Neither court commented or ruled on these issues.

Under the circumstances, if this Court grants the Petition and decides that the Pennsylvania Supreme Court erred as a matter of Federal Constitutional law by holding that Petitioner is a "limited purpose public figure," the Pennsylvania Supreme Court, on remand, would be able to decide the remaining issues on appeal. *See, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), *on remand after City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Therefore, the Brief in Opposition does not provide any basis for this Court to deny the Petition, but merely highlights that, as often is the case, there will be further proceedings on remand if this Court decides the case in favor of Petitioner.

Respondents' argument on the merits of the Constitutional question (Brief in Opposition, pp. 16-20) likewise fails to present a basis for this Court to deny review.

Respondents' argument that Petitioner's targeted direct marketing to private businesses and select individuals constitutes Petitioner's voluntarily injecting itself into a public controversy highlights both how far afield the Pennsylvania Supreme Court and some other courts have gone from this Court's limited ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that courts throughout the United States are split on this First Amendment issue. This is an issue on which this Court, since *Gertz*, "has not offered meaningful guidance. . . ."[1] That is a reason to grant, not to deny, the Petition.

Respectfully submitted,

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1. Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 Ky. L. J. 649, 668 (2006). Petitioner does not agree with the article's thesis that the *New York Times* rule should be extended to all defamation cases. The article does further demonstrate the desirability of this Court providing greater definition to the standard misapplied by the Pennsylvania Supreme Court in this case, and also demonstrates how the decision below fails to conform to *Gertz* by departing from the requirements of voluntary participation in a public controversy.